

Client Alert

ITC Section 337 Practice Group

December 2, 2013

Highlights From The ITCTLA Annual Meeting November 13, 2013

The ITC Trial Lawyers Association (“ITCTLA”) held its Annual Meeting in the Commission Main Hearing Room on November 13, 2013. Highlights of the Annual Meeting included Chairman Irving Williamson’s Opening Remarks in which he advised that the Commission is still diligently reviewing investigations appropriate for the 100-Day Initial Determination (“ID”) Procedure. Chairman Williamson was followed by a Panel Discussion on “Public Interest and the Presidential Review Process,” during which U.S. Trade Representative Stanford K. McCoy advised that there are “possibilities for future cases” in which the Commission may appropriately issue an exclusion order involving a standard essential patent (“SEP”), notwithstanding the President’s disapproval of similar relief in the 337-TA-794 Investigation on August 3, 2013.

In a subsequent Panel Discussion on “In-House Counsel Perspectives on ITC Litigation,” the panelists favorably commented on the Commission’s 100-Day ID Procedure. The panelists advocated expanding the procedure to areas such as Section 101, claim construction, importation, and FRAND issues. Moreover, at least one of the panelists suggested that a procedure should be implemented whereby parties could request a 100-Day ID on specific issues in an investigation in order to assist the Commission in investigating such issues prior to institution of an investigation. For a recommendation on a proposed procedure for enabling Complainants, Proposed Respondents, and members of the public to assist the Commission in identifying dispositive issues for the 100-Day ID Procedure during the 30 day pre-institution period, *see Section 337 Reporter Summer Associate Edition (2013) article by King & Spalding summer associates, Timothy H. Caine and Stephen R. Shin, entitled “Achieving Efficiency Through The Commission’s New 100-Day ID Procedure”* (appended hereto).

Juliana Cofrancesco, Attorney-Advisor to Commissioner Meredith M. Broadbent, provided her annual presentation on “Recent Trends at the International Trade Commission,” noting that while the number of new

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investigations, 39, in fiscal year (“FY”) 2013 is lower than FY 2012, the number of active matters, 124 (FY 2013), compares favorably with 129 (FYs 2011 and 2012), as does the number of new investigations plus ancillary proceedings – 52 (FY 2013) compared with 56 (FY 2012), 78 (FY 2011), and 58 (FY 2010). Because the length of time to target date has increased to 19.7 months (FY 2013), compared to 16.7 months (FY 2012), 13.7 months (FY 2011) and 18.4 months (FY 2010), the Commission has assigned a working group to facilitate shortening the time to target date in Section 337 investigations. For FY 2013, 40 percent of the Section 337 investigations were terminated by settlement or consent order, 27 percent by withdrawal of the complaint, and with respect to investigations reaching final determination, the Commission issued a remedial order in 48 percent of such investigations and found no violation in 52 percent of such investigations. Since the October 19, 2011 Rule change allowing the Commission to delegate the public interest issue to the presiding Administrative Law Judge (“ALJ”), the public interest issue has been delegated to the ALJ in 29 investigations. With respect to such investigations, 10 terminated by settlement or consent order, the complaint was withdrawn in 5, the Commission found no violation in 2, and 12 are pending. Finally, about one quarter of the active investigations are subject to the Commission’s Mediation Program. The Fourth Update of the Commission’s Section 337 Mediation Program (Publication No. 4433 November 2013), including an identification of all program mediators and their respective biographies, was distributed at the Annual Meeting. Copies are not yet available on the Commission’s website www.usitc.gov but will be provided by the King & Spalding authors of this summary upon request.

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